No. 97-1795

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

EQUALITY FOUNDATION OF GREATER CINCINNATI, INC., RICHARD BUCHANAN, CHAD BUSH, EDWIN GREENE, RITA MATHIS, ROGER ASTERINO, and H.O.M.E., INC.,

Petitioners,

—v.—

THE CITY OF CINCINNATI, EQUAL RIGHTS NOT SPECIAL RIGHTS, MARK MILLER, THOMAS E. BRINKMAN, JR., and ALBERT MOORE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners submit this Reply Brief to underscore the fundamental parity of Cincinnati's Issue 3 with the amendment this Court struck in *Romer v. Evans*, 517 U.S. 620 (1996); the application of *Romer*'s holdings to this case; and the pressing need for the conflict between *Romer* and the ruling below to be resolved to prevent further, serious injury to individuals, compromise to this Court's ruling in *Romer*, and damage to the integrity of the Equal Protection Clause.

I. The Cincinnati and Colorado Amendments Are Indistinguishable in All Material Respects.

Respondents' attempts to distinguish the Cincinnati charter amendment at issue here from Colorado's Amendment 2 are unavailing. The two measures are the same in the following dispositive ways:

- Issue 3, like Amendment 2, erects an ongoing ban on all government bodies from protecting lesbians, gay men, and bisexuals from discrimination. Respondent Equal Rights Not Special Rights (ERNSR) erroneously treats Issue 3 as merely repealing extant legal protections for lesbians, gay men, and bisexuals, and as a decision by a government body declining to enact a law protecting gay people from discrimination. ERNSR Brief in Opposition at 13-16, 22-23, 25, 28-29. In fact, Issue 3's text, like Amendment 2's, prospectively bans protective measures so that public officials within its jurisdiction can *never* establish any protections for gay people. Both measures operate to "forbid all laws or policies providing specific protection for gays or lesbians from discrimination." *Romer*, 517 U.S. at 629.
- ERNSR calls Issue 3's ban on "protected status" for gay people a lesser restriction than Amendment 2's ban on a

"claim of discrimination." ERNSR Opp. at 28-29. *See also* Cincinnati Brief in Opposition at 9-10. But enumeration as a "protected status" is "the essential device used to make the duty not to discriminate concrete," *Romer*, 517 U.S. at 628, and thus to provide a "claim of discrimination." *See also Greenwood v. Taft, Stettinius & Hollister*, 105 Ohio App.3d 295, 299, 633 N.E.2d 1030, 1032 (1995). Indeed, the Cincinnati Human Rights Ordinance designates as a "protected status" each trait that gives rise to a discrimination claim. Jt. App. 683. Even ERNSR concedes that Issue 3's preclusion of "protected status" for gay people eliminates a "legal basis for challenging any adverse action — *i.e.*, *discrimination* on the basis of homosexuality." ERNSR Opp. at 29 (emphasis added). Thus, Issue 3, like Amendment 2, denies gay people access to basic antidiscrimination laws and protections.

- Issue 3, like Amendment 2, directs its ban, and thus its injury, *only* at gay people, as respondent City of Cincinnati recognizes. Cincinnati Brief in Opposition at 7; *Romer*, 517 U.S. at 627. Neither amendment returns government to "neutrality" regarding gay people, ERNSR Opp. at 25; indeed, neither even purports to remove sexual orientation as a protected category. Rather, both directly classify and burden only lesbians, gay men, and bisexuals.
- Issue 3, like Amendment 2, changes the jurisdiction's basic governing document to impose its sweeping disabilities on gay people. It prevents *all* government entities in the jurisdiction from protecting gay people in *any* and *all* public and private sector matters, contrary to ERNSR's characterization. ERNSR Opp. at 24, 28-29; *Romer*, 517 U.S. at 629. Thus, Issue 3 amends Cincinnati's charter to impose the same across-the-board

disabilities as the invalidated Colorado amendment sought to effect.

- Issue 3, like Amendment 2, makes it substantially more difficult for gay people than for others to obtain protections from discrimination. ERNSR's suggestion that Issue 3 merely affects the City's Human Rights Ordinance, ERNSR Opp. at 29, is patently incorrect. Several different levels of Cincinnati's government can provide antidiscrimination protections, as ERNSR concedes. *Id.* at 19-20. Constituents can go to the City Council, lobby the City Manager, advocate at any City institution, gather signatures and persuade the public to support an initiative providing protections, or engage the initiative process to propose a protective charter amendment. *Cf. Id.* Gay Cincinnatians have only the last of those options. This relegation to only one, "more difficult" mechanism, *Romer*, 517 U.S. at 633, mimics Amendment 2, which likewise left amendment of the governing document as the only option for gay people to obtain antidiscrimination protections. *Id.* at 631.

In sum, both Issue 3 and Amendment 2 change their respective governing documents to ban categorically all government actors within their jurisdictions from ever protecting lesbians, gay men, and bisexuals against sexual orientation-based discrimination. Both measures "identif[y] persons by a single trait and then den[y] them protection across the board." *Id.* at 633. They not only "withdraw[] from homosexuals, but no others, specific legal protection from the injuries caused by discrimination" but also "forbid[] reinstatement of these laws and policies," making it "more difficult" for gay people ever to obtain protection from their government. *Id.* at 627, 633. As in *Romer*, these characteristics doom Issue 3 as constitutionally flawed, and they require reversal of the Sixth Circuit's decision to uphold Issue 3 despite *Romer*.

II. The Ruling Below Conflicts with *Romer*.

Both measures use the same mechanism to the same effect, but the City and ERNSR insist that Issue 3 can be sustained while its Colorado counterpart could not be. They reach this anomalous conclusion by mischaracterizing the two amendments, as shown above, and then misapplying *Romer*'s literal violation holding and its straightforward rational basis review of a virtually identical classification.

When this Court held that Amendment 2's singular ban on protections violated the literal terms of the Equal Protection Clause, it never once referred to the level of government restricted by the measure before it. The Court instead said that:

> A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense.

Romer, 517 U.S. at 633. Although respondents would confine this holding to statewide measures, the Court's opinion does no such thing. Indeed, the Court itself, in its literal violation discussion, relies on a proposition originally made in a case about a city's discriminatory acts. *Id.* at 633-34 (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942)(quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886))("The guaranty of 'equal protection of the laws is a pledge of the protection of equal laws.'").

Respondents also try to distinguish *Romer* by downplaying the civil rights protections banned by Issue 3, calling them a "government benefit." ERNSR Opp. at 13. But those protections constitute the same type of "aid from government" that Amendment 2 unlawfully foreclosed. By upholding a measure that, like Amendment 2, "declare[s] that in general it shall be more difficult for one group of citizens than for all others to seek aid from the [Cincinnati] government," the Sixth

Circuit's ruling plainly conflicts with *Romer*'s holding that Amendment 2 worked a literal violation of the constitutional equal protection guarantee.

Respondents also gloss over the conflict between the Sixth Circuit's application of rational basis review to Issue 3's classification of lesbians, gay men, and bisexuals and this Court's rational basis review of the same classification in *Romer*. As this Court explains, government must be able to identify a legitimate end that is rationally served when it treats one group of people differently from all others. *Romer*, 517 U.S. at 632-33. The government — including voters — may draw lines in policymaking, but the purpose of the line drawn must be legitimate and the distinction in treatment must rationally serve that legitimate end or the measure will conflict with the Fourteenth Amendment's equal protection guarantee. *Id.*

Respondents suggest that the need for cost-savings — proffered both in *Romer* and here — legitimately and rationally explains Issue 3's classification even though this Court deemed it too "far removed" to explain Amendment 2's parallel discrimination. *Id.* at 1629; Cincinnati Opp. at 14-15; ERNSR Opp. at 24. As their sole support for this flawed analysis, the Sixth Circuit and respondents erroneously portray Amendment 2 as though it only implicated the financial interests of Coloradans in cities with antidiscrimination protections. *Id. See also* App. 20a.

In reality, just as Issue 3 affects the interests of all City residents because it is a citywide measure, Amendment 2 affected all Coloradans. As this Court noted, Amendment 2 banned *all* statewide measures protecting gay people, including: Colorado Executive Order D0035 (1990) (forbidding employment discrimination against state employees based on sexual orientation), Colo. Stat. Ann. §10-3-1104 (1992 Supp.) (prohibiting sexual orientation discrimination by health insurance providers), and "'various provisions prohibiting discrimination based on sexual orientation at state colleges.'" *Romer*, 517 U.S.

at 626-27, 629-30. Respondents' effort to distinguish the measures by their geographical scope is unavailing.

More importantly, *Romer*'s literal violation and rational basis holdings do not turn on the state's regulation of municipalities. Instead, they turn on the clash between Amendment 2's permanent ban on protections for one group of people, which Issue 3 copies, and the Equal Protection Clause's substantive guarantee. ERNSR concedes, as it must, that the same equal protection standard applies to cities as to states. ERNSR Opp. at 15. *Romer* thus does not permit the Sixth Circuit's upholding of Issue 3's copycat ban to stand.

III. The Conflict Between *Romer* and the Ruling Below Involves an Important Federal Question Because Issue 3-Type Measures Threaten to Undermine this Court's Mandate in *Romer*.

Ignoring that this Court reversed and remanded the Sixth Circuit's initial ruling upholding Issue 3, ERNSR brushes off the impact of the Sixth Circuit's ruling as being insignificant "beyond the four corners of this case." ERNSR Opp. at 11. In fact, on the heels of that ruling, a proposal has been advanced in Ypsilanti, Michigan, to prevent that city from protecting its gay constituents. Petition at 14. Lesbians, gay men, and bisexuals in Alachua County, Florida, Riverside, California, Concord, California, and numerous Oregon cities and counties have all battled Issue-3-type measures within the past seven years.[1] This is not a dead issue, as ERNSR suggests. Measures like Issue 3 pose a clear and present danger to the integrity of the Equal Protection guarantee. *See* Brief Amici Curiae of the City of Aspen, et al., in Support of Petitioners.

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[1] *See* Comment, *Restraints on Homosexual Rights Legislation: Is There a Fundamental Right to Participate in the Political Process?*, 28 U.C. Davis L. Rev. 445, 446 n.2, 447 n.7 (1995).

Left in place, the Sixth Circuit's ruling opens the door to these city and county clones of Amendment 2 to adopt the same restrictions as Amendment 2 imposed. In *Romer*, the Court identified the "severe consequence[s]" resulting from Amendment 2. *Romer*, 517 U.S. at 629. The consequences will be just as serious if Issue 3-type measures are permitted to flourish in cities and counties.

The Court already recognized the importance of the issues in this case when it granted certiorari once before. 518 U.S. 1001 (1996). The ruling below again warrants this Court's attention to end finally the erosion of the Fourteenth Amendment's equal protection guarantee through Issue-3-type measures.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the petition for a writ of certiorari should be granted and the judgment below summarily reversed, or, alternatively, subjected to plenary review.

Respectfully submitted,

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